

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
)	
Review of the Commission's)	MM Docket No. 98-204
Broadcast and Cable)	
Equal Employment Opportunity)	MM Docket No. 96-16
Rules and Policies and)	
Termination of the EEO)	
Streamlining Proceeding)	

**REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION**

The National Cable Television Association ("NCTA"), by its attorneys,
submits the following Reply Comments in the above-captioned proceeding.

I. NCTA SUPPORTS THE ADOPTION OF AN EFFECTIVE EEO PROGRAM

The cable industry remains fully committed to a program of enforceable EEO procedures. As the comments of NCTA and member companies demonstrate, the cable industry recognizes the importance of effective and enforceable EEO procedures. Consistent with this objective, we support the development of the procedural adjustments made necessary by the Lutheran Church decision.¹

NCTA's comments endorsed the Commission's proposals for revisions to the cable EEO rules and reaffirmed the cable industry's support for enforceable procedures that will promote equal opportunity in cable employment. The cable industry reiterated

¹ Lutheran Church-Missouri Synod v. FCC, 141 F. 3d 344 (D.C. Cir. 1998), *rehearing denied*, Sept. 15, 1998.

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its long-standing commitment to an EEO regime that is designed to achieve the goal of a diverse work force.

NCTA's comments supported the Commission's specific proposals for achieving its diversity goals:

- We recommended adoption of the Commission's proposal under which employers would be given discretion to determine how to conduct recruitment efforts so long as they are able to show that these efforts will result in the attraction of a broad cross section of qualified applicants.
- We endorsed the adoption of the proposed program to evaluate and analyze minority recruitment sources, as well as the review of seniority and pay/benefits practices.
- We further recommended the adoption of an effective record-keeping mechanism to enable cable operators to demonstrate that they are engaged in credible efforts to comply with the regulations.
- Finally, we recognized the need for sanctions if a cable operator violates the rules or engages in unlawful discrimination, but recommended sanctions should not be imposed where cable operators undertake credible efforts to identify minority and female applicants for each vacancy.

Cable companies responding to the Notice similarly urge the Commission to maintain an effective EEO program. TCI explains that "EEO programs are essential to cable industry success."² TCI's diversity effort "is embraced at high levels and is now part of a corporate culture supported by management and implemented by the human resources department."³ The company further notes its successful efforts to diversify its work force, stating that "[a]s competitive demands and low unemployment further squeeze entities in search of qualified employees, sound EEO policies and practices become more than simply a threshold requirement for attracting the necessary workforce.

² Comments of Tele-Communications, Inc., MM Docket No. 98-204, Mar. 1, 1999, at 4 ("TCI Comments").

³ Id.

In other words, TCI believes that effective EEO programs are vital to the lifeblood of the cable industry, namely its people.”⁴

Time Warner Cable “supports affirmative action and compliance with the EEO provisions of the 1984 Cable Act, not because it is required to do so, but rather as a part of its ongoing efforts to promote equal opportunity and diversity in employment.”⁵ Time Warner believes that the proposed rules “will further enhance diversity in the workplace by encouraging minority employment outreach programs and continuing to prohibit unlawful discrimination. Time Warner fully supports these proposals and intends to continue its practice of equal opportunity.”⁶

The comments of Cole, Raywid and Braverman (“Cole, Raywid”) are submitted on behalf of nine cable MSOs that “embrace the spirit and objectives of the statutory equal employment opportunity ... provisions ... and have fulfilled the specific EEO program requirements articulated by the ... Commission.”⁷ Cole, Raywid goes on to note that “since the adoption of federal EEO requirements ... cable industry entities have steadily expanded and enhanced their equal employment opportunity programs and recruitment efforts providing job openings and opportunities to applicants with a wide array of backgrounds and interests.”⁸

⁴ Id. at 6-7 (citation omitted).

⁵ Comments of Time Warner Cable, MM Docket No. 98-204, Mar. 1, 1999, at 2.

⁶ Id. at 4.

⁷ Comments of Cole, Raywid and Braverman, MM Docket No. 98-204, Mar. 1, 1999, at 1 (“CRB Comments”).

⁸ Id. at 1-2.

II. THE COMMISSION SHOULD ADOPT THE CABLE INDUSTRY'S RECOMMENDATIONS RELATING TO RECRUITMENT, ANALYSIS, RECORD-KEEPING AND ENFORCEMENT

At issue in this proceeding are the procedures relating to recruitment, analysis, record-keeping and enforcement. The Commission, with limited modifications in certain circumstances, should adopt its proposals for addressing each of these areas.

A. Recruitment

In its comments, NCTA recommended that the Commission adopt its proposal to afford entities “the discretion to determine how to conduct recruitment efforts as long as they can demonstrate that their efforts attract a broad cross section of qualified applicants.”⁹ Under NCTA’s proposal, cable operators could employ national, regional and local recruitment sources to fill positions that are not filled by internal promotion.

NCTA further explained that in the course of identifying recruitment sources, cable companies should not be limited to sources owned or controlled by minorities or females. “General” sources, such as public and private employment agencies, may prove successful at identifying minority and female recruits. The Commission’s evaluation of a cable system’s recruitment sources should recognize the potential effectiveness of “general” sources in the identification of minority and female recruits.

TCI similarly supports the Commission’s proposal to afford cable companies discretion to develop “open and effective” recruitment sources. It calls for a procedure that enables cable entities to identify recruiting sources that are reflective of the community served.¹⁰ It further contends that in light of the cable industry’s “successful

⁹ Comments of the National Cable Television Association, MM Docket No. 98-204, Mar, 1, 1999, at 9, citing Notice at para. 64.

¹⁰ TCI Comments at 13.

past EEO performance and continued improvement, ... it is reasonable to allow cable entities to set the recruitment methods and policies that best suit each operator.”¹¹

The Commission should recognize the need for flexibility as to recruitment contacts and sources used by small cable systems in small markets. As the FCC has recognized with respect to small broadcast stations (those with 10 or fewer employees) operating in small markets, small cable systems “have fewer hiring opportunities and limited financial, personnel and time resources available for recruiting.”¹²

B. Analysis

NCTA supports the Commission’s proposal to evaluate and analyze the efforts of cable systems “to recruit, hire and promote in a non-discriminatory fashion and address any difficulties in implementing its EEO program.”¹³ The Commission should maintain the requirement that cable systems with more than five employees submit an analysis every five years of their efforts to recruit, hire and promote minorities and women during the previous 12 months.

The comments of other cable parties also support this approach. TCI and the Comments of Cole, Raywid each recommend that “the Commission leave the self-assessment reporting requirement intact.”¹⁴ TCI endorses the Commission’s suggestion, consistent with Lutheran Church, that cable system submissions “should *not* include the

¹¹ Id.

¹² Notice at para. 84. The Commission should also take these factors into account when evaluating the efforts of such cable systems and their success at attracting a broad cross section of qualified applicants. As the Commission recognizes with respect to small stations in small markets, small cable systems located in small markets may have difficulties competing for employees with entities in larger markets. Notice at para. 83.

¹³ Notice at para.72.

¹⁴ TCI Comments at 13.

use of any employment profiles to determine the adequacy of an entity's EEO efforts.”¹⁵

Similarly, the Comments of Cole, Raywid on behalf of multiple cable MSOs call for the retention of employer self-assessment rules.¹⁶

The information reported annually by cable systems on a revised Form 395-A and the more detailed information filed every five years will enable the Commission to evaluate and analyze the efforts of cable companies to recruit minorities and females, including data on promotion and pay and benefits practices. Based upon these submissions, the Commission will be able to determine whether or not a cable system is engaging in nondiscriminatory recruitment and related employment practices.

C. Record-keeping

NCTA's comments supported the Commission's proposal for EEO record-keeping.¹⁷ Under this proposal, cable operators will be required to retain records demonstrating that they are undertaking credible efforts to recruit qualified minority and female applicants for all vacancies.

NCTA endorsed a procedure in which cable operators are required to retain, but not file, records listing the dates vacancies are filled, dated copies of advertisements, bulletins and letters announcing vacancies, and to compile data on the race, ethnic origin and sex of all applicants for each vacancy according to recruiting source. The Commission staff would then be able to use this data to review a system's track record in either an on-site or letter audit. This review process would be preferable to the more

¹⁵ Id. (emphasis in original).

¹⁶ CRB Comments at 7.

¹⁷ See NCTA Comments at 13-14.

burdensome approach described at paragraph 77 of the Notice which would require all applicants to comply with a new Form 395-A reporting requirement.

TCI echoes NCTA's approach. TCI calls for the adoption of a requirement that cable entities "... record all information detailing their recruitment efforts and sources for each job vacancy."¹⁸ TCI believes that the collection of EEO information "will greatly benefit cable entities' own internal assessment of their recruitment practices."¹⁹ The company asserts that in conjunction "with the continued practice of cable entity certification and on-site audits, requiring operators to maintain recruitment data would provide the Commission with an effective tool to enforce open effective recruitment, and a deterrent to protect against lax outreach efforts."²⁰

NCTA's comments urged the Commission to evaluate a cable system's record-keeping in the overall context of the system's efforts to identify minority and female applicants for available vacancies. Records showing that a cable operator has not been successful in identifying minority and female applicants should not be presumed to demonstrate a violation of the rules. Where the records suggest recruitment sources are not successful, the Commission should look beyond the bare records to understand what has occurred.

D. Sanctions

NCTA's comments supported sanctions to enforce compliance with the EEO regulations. Cole, Raywid concurs, contending that maintaining the current process of

¹⁸ TCI Comments at 15.

¹⁹ Id. at 15.

²⁰ Id. at 15-16.

requiring submission of the Form 395-A and Supplemental Investigation Sheets, conducting periodic audits, and penalizing entities found in violation of these requirements “with monetary fines or decertification”²¹ will achieve the Commission’s goals.

Sanctions are clearly appropriate if a cable system demonstrates a consistent pattern of discrimination in hiring. Sanctions are also justified if an operator refuses to comply with the Commission’s EEO regulations, or willfully files untruthful information in EEO submissions or in response to Commission information requests.

Sanctions should not be imposed, however, where cable systems undertake credible efforts to identify minority and female recruitment sources, even where those efforts are not successful. Instead, sanctions should be limited to those egregious circumstances in which an operator is not attempting to identify minority and female sources.

²¹ CRB Comments at 13.

CONCLUSION

As the foregoing comments demonstrate, the cable industry continues to be firmly committed to an effective and enforceable EEO program. Adoption of the Commission's proposals, as modified by NCTA's comments and reply comments, will achieve the Commission's goals.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dan L. Brenner", written over a horizontal line.

Daniel L. Brenner

David L. Nicoll

1724 Massachusetts Avenue, NW
Washington, DC 20036
202-775-3664

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Counsel for the National Cable Television
Association